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No. 04-1315

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The City of New York (the "City") and the New York State Association of Counties ("NYSAC") submit this brief in support of the petition for a writ of certiorari in this case. Both parties have consented to the filing of this brief, and their consent letters are being filed herewith.[1]

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE AMICI CURIAE

The City and NYSAC have a significant interest in having this Court grant the petition and determine the validity of 29 C.F.R. 552.109(a) -- a longstanding United States Department of Labor regulation (hereinafter the "third-party employer regulation") that applied the "companionship services" exemption in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §213(a)(15), to employees engaged in providing companionship services and "employed by an employer or agency other than the family or household using their services."

The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

The City, the nation's largest municipality, oversees a Medicaid-funded program, which provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants. These personal care services are delivered through contracts with over 90 provider agencies throughout the City.

Pursuant to this program, Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to

allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of care to be provided to Medicaid clients is the responsibility of the City's Human Resources Administration.

Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

As a result of the third-party employer regulation, prior to the Second Circuit's decision declining to enforce that regulation, the home attendants were not subject to the wage and overtime requirements of the FLSA, and the annual cost to the Medicaid program of the City's personal care services program was approximately $1.6 billion dollars.

NYSAC is a not-for-profit municipal corporation incorporated pursuant to the laws of the state of New York. The sole membership of NYSAC consists of the 62 counties in New York state. NYSAC is the only statewide municipal association representing elected county executives, county supervisors, legislators, representatives, commissioners, and administrators from the 62 counties, including the 5 counties comprising the City. NYSAC's activities involve essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the state. Outside the City, each of NYSAC's member counties

provides Medicaid-funded personal care services in its respective jurisdiction throughout the state.

The Second Circuit's decision declining to enforce the third-party employer regulation will have serious ramifications for the Medicaid-funded programs, in terms of both cost and the provision of care, for everyone involved in the program, including the government, the providers of service, the home attendants, and individuals receiving personal care services. Therefore, the enforceability of the third-party employer regulation is of vital importance to the City and NYSAC.

SUMMARY OF THE ARGUMENT

The petition should be granted for three reasons. First, the enforceability of the third-party employer regulation is of profound importance, because it has serious implications for the Medicaid-funded personal care services programs, such as those administered by the City and the counties. The Second Circuit's decision is expected to tremendously increase the annual cost of the programs, and it is unclear whether additional funding will be available to cover these cost increases. While the costs arguably could be limited somewhat by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client without jeopardizing the client's welfare.

Second, there is a direct conflict in the Circuits as to the degree of deference to be accorded the third-party employer regulation, with the result that the Tenth Circuit has upheld the regulation, while the Second Circuit declined to enforce the regulation. Third, the Second Circuit's decision is erroneous and misapplied this Court's

precedents regarding the amount of judicial deference to be accorded administrative determinations.

This case merits this Court's guidance and the exercise of this Court's supervisory powers.

REASONS FOR GRANTING THE PETITION

I. THE ENFORCEABILITY OF THE THIRD-PARTY EMPLOYER REGULATION IS OF GREAT IMPORTANCE.

The Second Circuit's decision, declining to enforce the third-party employer regulation, is of profound importance, in that it has serious implications for the Medicaid-funded personal care services programs administered by the City and the counties in New York state, in terms of both cost and the provision of care.

A. Economic Implications of the Circuit's Decision

In the City alone, the Second Circuit's decision is estimated to increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $279 million annually.[2] The City's Medicaid funding will need to increase from $1.592 billion to about $1.871 billion annually in order to sustain its current client service levels. As set forth below, the estimated additional $279 million annual cost consists primarily of: (1) overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (2) an increase in billable and overtime hours for 24 hour daily care provided by "sleep-

[2] In the Circuit, the City had estimated an increased annual cost of over $263 million. The new numbers reflect the City's most recent figures.

in" home attendants; and (3) travel time, which will now have to be paid to attendants who serve more than one client and travel between cases.

1. Paid Overtime

The City currently authorizes the delivery of approximately 105,778,000 hours of service annually to approximately 45,000 personal care service clients. Services to most of these clients are rendered by not-for-profit providers operating under the invalidated third-party employer exemption. The City's Human Resources Administration staff estimates that approximately 24,000 clients require more than 40 hours of personal care services per week and that 19% of the personal care service hours provided in City Fiscal Year 2004 were provided by attendants working in excess of 40 hours weekly.

These hours would be subject to overtime pay under the Second Circuit's decision. The estimated incremental cost of overtime is approximately $103 million annually.

2. "Sleep-In" Cases

Among the innovations developed by the City to facilitate delivery of personal care services to its frail and vulnerable residents is a service modality known as "sleep-in" service. Under this approach, a home attendant stays with a client for a 24-hour period, during which time the attendant is on paid duty for 12 hours, and is off duty for the remaining 12 hours, and is provided with sleeping accommodations during this time. The "sleep-in" attendant may be roused up to three times during the unpaid hours, and so is available to assist the client with special needs, such as toileting or turning, during the night-time hours. Typically these services are provided by two home attendants during the week -- one of whom stays with the client for five 24-hour periods, and the other for the

remaining two. This program is well accepted by both clients and home attendants, and reflects the close relationship that is appropriately developed between them.

The City currently has approximately 5,400 clients who receive 24 hour daily care from home attendants who "sleep-in". These sleep-in home attendants are present 24 hours daily and receive an hourly wage for each of 12 hours; they are not compensated for the 12 hour "sleep-in" portion of the day but, rather, receive a daily shift differential. Provider agencies are authorized to bill Medicaid for 84 hours weekly (12 hours daily x 7 days) for these cases.

Pursuant to the Second Circuit's decision, the non-paid "sleep-in" hours would be limited to 8 hours daily under the FLSA. See 29 C.F.R. §785.22 (explaining generally that, where an employee is required to be on duty for 24 hours or more, a bona fide sleeping period of not more than 8 hours may be excluded from hours worked and that interruptions of sleep by a call to duty must be counted as hours worked). Accordingly, the provider agency service payment authorization for these cases would have to be increased from 12 to at least 16 hours daily. These additional 4 hours daily for these cases will increase the billable hours for the City's contracted home attendant provider agencies by 7,841,660 hours annually, with a resulting additional annual cost to the government of approximately $120.9 million for straight-time service.

Further, the additional paid hours on these sleep-in cases will also have an overtime impact since the home attendants presently servicing these cases are already working hours that would be subject to overtime pay if this Court's ruling is upheld. Accordingly, the additional hours subject to wages on the sleep-in cases will also be subject to paid overtime. The cost of the overtime (i.e., the

additional one-half-time cost) for these hours is about $40 million annually.

3. Travel Time

The City's Medicaid-funded personal care service program includes approximately 12,300 clients who receive an average of 21 hours of service weekly. Many of the home attendants service more than one of these cases in order to earn a full-time wage.

Presently, home attendants' wages are limited to hours actually worked; the home attendant is not paid for the time spent traveling between cases. Pursuant to the Second Circuit's decision, the time spent in transit by these employees will be subject to wages under the FLSA. See 29 C.F.R. §785.38 (explaining generally that travel time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the work day, must be counted as hours worked). The City's Human Resources Administration staff conservatively estimates the annual cost to government as about $13.3 million.

In short, the economic impact of the Second Circuit's decision is tremendous.

B. Implications for the Provision of Care

It is unclear whether the additional funding to cover the increased costs will be available.

As to the personal care services program overseen by the City, 50% of the cost is covered by the federal government, 40% by the state, and 10% by the City. The City negotiates the hourly rates for each provider prospectively and then submits them to the state for

approval. The City has submitted a request to the state for increased rates, in light of the Second Circuit's decision, and is awaiting the state's determination. If the request is not approved and additional funding is not appropriated by the state in its budget, the providers will have no funding source to pay the additional costs to comply with the FLSA.

It might be argued that some of the costs outlined above could be avoided by limiting the hours of service provided to an individual client by a home attendant to a maximum of 40 hours per week. Thus, for example, a client requiring 24 hour coverage would be served by multiple home attendants. However, there are substantive reasons why this is not readily doable. The relationship between a home attendant and the client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below.

1. Privacy in the Home

Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

2. Continuity of Care

Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

3. Family Compatibility

In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can be difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client. If the client's family is unwilling to allow multiple attendants in the home, the family may insist that the client is transferred to a nursing home.

In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, limit the ability to provide multiple attendants for each client, in order to keep costs down.

This Court should review the Second Circuit's decision, given the serious implications in terms of both cost and the provision of care for the Medicaid-funded personal care services programs administered by the City and the counties in New York State.

II. THERE IS A DIRECT CONFLICT IN THE CIRCUITS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED THE THIRD-PARTY EMPLOYER REGULATION.

The Second Circuit's decision as to the degree of deference to be accorded the third-party employer regulation conflicts directly with that of the Tenth Circuit in *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000), *cert. denied,* 531 U.S. 1072 (2001). In *Johnston*, the Tenth Circuit accorded the third-party employer regulation deference pursuant to this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and upheld the regulation. *See Johnston*, 213 F.3d at 561-62. In this case, by contrast, the Second Circuit declined to accord the third-party employer regulation *Chevron* deference, applied the less-deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and declined to enforce the regulation. *See Coke*, Pet App. at 19a-29a.

While the Second Circuit attempted to distinguish *Johnston* on the ground that it pre-dated this Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (*see* Pet. App. at 21a-22a), as explained by this Court, "*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form," or "to eliminate *Skidmore's* recognition of various justifications for deference depending on statutory circumstances and agency action." *Mead*, 533 U.S. at 234, 236-38.

Indeed, in cases following *Chevron* but pre-dating the Tenth Circuit's decision in *Johnston*, this Court applied the less-deferential *Skidmore* standard, in reviewing certain administrative determinations. *See, e.g., Christensen v.*

Harris County, 529 U.S. 576, 586-87 (2000) (applying the less-deferential *Skidmore* standard in reviewing a Department of Labor opinion letter). Thus, the fact that the Tenth Circuit's decision in *Johnston* pre-dated this Court's decision in *Mead* does not in any way minimize the direct conflict between the Circuits.

III. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS AND MISAPPLIED THIS COURT'S PRECEDENTS REGARDING THE DEFERENCE TO BE ACCORDED ADMINISTRATIVE DETERMINATIONS.

The Second Circuit's decision is erroneous and misapplied this Court's precedents regarding the deference to be accorded administrative determinations.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court upheld a regulation of the Environmental Protection Agency, on the ground that it was a permissible construction of the Clean Air Act. This Court explained that, if Congress has not directly spoken to the precise question at issue and has delegated to an agency to elucidate a specific statutory provision, the agency's regulation, which is then considered legislative, must be given controlling weight, unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 842-44. This Court noted that the fact that the agency has from time to time changed its interpretation does not mean that the agency's interpretation is not entitled to deference. This Court emphasized that an agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Id.* at 863-64. Additionally, this Court noted that an agency to which Congress has delegated policymaking responsibilities may, within the limits of its delegation, properly rely on the

incumbent administration's view of wise policy to inform its judgments. *Id.* at 865-66.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that a tariff classification in a U.S. Customs Service ruling letter regarding day planners was not entitled to *Chevron* deference. This Court explained that *Chevron* deference applies when the statute is ambiguous, Congress has delegated authority to the agency to make rules carrying the force of law, and the agency interpretation was promulgated in the exercise of that authority. *Id.* at 226-27, 229.

This Court, in holding that *Chevron* deference did not apply, relied on the facts that there was no indication that Congress meant to delegate authority to Customs to issue ruling letters with the force of law and that the ruling letter: was not subject to a notice and comment procedure; did not go beyond the specific case under review and did not bind third parties; was subject to modification without notice, except to those persons to whom the letter was addressed; could be issued by any of 46 different Customs offices, which issued approximately 10,000 to 15,000 such letters per year; and did not have to be published. *Id.* at 223-24, 230-34.

In this case, pursuant to the above standards, the third-party employer regulation was entitled to *Chevron* deference. There is no dispute that the companionship exemption expressly delegated authority to the Department of Labor to define and delimit the terms "companionship services" and "domestic service employment." *See* 29 U.S.C. §213(a)(15); *Coke*, Pet. App. at 20a, 23a. Additionally, as explained by petitioners, the Department of Labor third-party employer regulation was promulgated in the exercise of that authority, where: the third-party employer regulation expressly relies on the companionship exemption; Part 552 of the regulations indicates that the

companionship exemption was the authority for all of the regulations in that part; and the Department of Labor, in its rulemaking and brief, has proclaimed that the third-party employer regulation was a legislative regulation promulgated pursuant to the Congressional delegation. *See* Pet. at 18-22.

Unlike in *Mead*, the administrative determination at issue here is a regulation, not a letter ruling, and carries the force of law, in that it: is published and was subject to the notice and comment procedures; goes beyond one case and binds all employees of third-party employers; and has been in force for thirty years without change, notwithstanding that Congress has on numerous occasions amended 29 U.S.C. §213, which contains the companionship exemption. Thus, the Second Circuit misconstrued *Mead* in erroneously declining to accord the third-party employer exemption *Chevron* deference. *See also* Richard J. Pierce, *Admin. L. Treatise* §6.4 at 324-25 (4th ed. 2002) (explaining that legislative rules have binding effect, are required to be promulgated pursuant to notice and comment procedures, are within the scope of rulemaking authority conferred by Congress, and impose distinct obligations on members of the public).

Indeed, further supporting the proposition that the Second Circuit misapplied this Court's decision in *Mead* is the fact that, following *Mead*, this Court does not appear to have declined *Chevron* deference to any similar regulation. *See, e.g., Washington State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382, 390 (2003) (holding that *Chevron* deference was owed to the regulations of the Commissioner of Social Security); *Barnhart v. Walton*, 535 U.S. 212, 217-22, 224-25 (2002) (same and explaining that *Chevron* was the appropriate standard, given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity

of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 41, 45-48 (2002) (according *Chevron* deference to Interstate Commerce Commission regulations, which were issued pursuant to an express delegation by Congress, after notice and comment proceedings, and differed from the regulation originally proposed).

Chevron deference appears to have been declined only to internal guidance memoranda and interpretations contained in publicly available operating instructions for processing social security claims, which were not the product of formal rulemaking. *See Alaska Dep't of Envtl. Conservation v. Envtl. Protection Agency*, 540 U.S. 461, 487-88 (2004); *Washington State Dep't of Social and Health Servs.*, 537 U.S. at 385-86.

This post-*Mead* treatment of such regulations is consistent with other pre-*Mead* cases. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000) (emphasizing that "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (noting that no deference was required to the interpretation of the Administrative Procedure Act by the Director of the Office of Workers' Compensation Programs, where, *inter alia*, that interpretation was not embodied in any regulation or similar binding policy pronouncement to which *Chevron* deference would apply); *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977) (a pre-*Chevron* case noting that courts are not required to give effect to interpretive regulations, but emphasizing that where Congress expressly delegated to an agency to prescribe standards or interpret statutory terms, the agency adopts regulations with legislative effect, which are entitled to review under the arbitrary and capricious standard).

In short, the Second Circuit erred and misapplied this Court's precedents when it declined to accord *Chevron* deference to the Department of Labor's third-party employer regulation. The third-party employer regulation is reasonable, especially where, as noted by the District Court and explained by the Department of Labor, part of the reasoning behind the FLSA companionship services exemption is to allow those in need of such services to find assistance at a price they can afford and prevent them from unnecessarily being forced into long-term care institutions. As emphasized by the District Court, whether the services are provided by direct hiring or through the use of an agency, the objective is still the same: to allow the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA. *See* Pet. App. at 52a, 63a, 70a-71a.

In order to avoid repetition, the amici curiae adopt the other arguments made by petitioners in support of a grant of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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